

STATE OF MICHIGAN
COURT OF APPEALS

WOODWARD NURSING CENTER, INC.,

Plaintiff-Appellant,

and

DR. MEER J. DEEN,

Plaintiff

v

MEDICAL ARTS, INC.,

Defendant-Appellee,

and

A-1 INTERNATIONAL MEDICAL
PERSONNEL, KEVIN PRICE AND KAREN
DROZ,

Defendants.

UNPUBLISHED
February 16, 2012

No. 295297
Wayne Circuit Court
LC No. 07-701593-CK

Before: WILDER, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Plaintiff¹ appeals as of right a final order of dismissal in this case involving allegations of negligence, malpractice, and breach of contract against defendants². We affirm.

¹ “Plaintiff” will refer to the appellant, Woodward Nursing Center, Inc.

² While “defendants” will refer to all defendants, “defendant” will refer solely to the appellee, Medical Arts, Inc.

I. BASIC FACTS

This is the third time that this case has been before this Court. In this Court's first opinion, the Court conveniently summarized the relevant facts as follows:

Plaintiff alleges that in late May 2003, defendants agreed in a written contract to provide prescription medications and supplies for plaintiff's nursing home residents. Plaintiff contends that it sent defendant a prescription order on August 11, 2004, but that defendants failed to process or deliver the prescription for more than twelve days. According to plaintiff, defendants then lied in an effort to conceal their nonperformance, allegedly stating that the prescription order had been illegible or indecipherable. Plaintiff alleges that, in fact, defendants had merely lost or misplaced the prescription order. Plaintiff asserts that defendants' delay in filling the prescription caused it to lose a valuable Medicaid program certification.

Plaintiff filed its complaint asserting four claims against defendants. Plaintiff alleged breach of contract (count I), negligence (count II), malpractice (count III), and fraud (count IV). Defendants moved for summary disposition, arguing that all four claims actually alleged medical malpractice and that because plaintiff had not filed a notice of intent or an affidavit of merit, the claims should be dismissed. The trial court denied defendants' motion, finding that plaintiff's breach of contract claim was not one of malpractice. The trial court did not address plaintiff's remaining claims. [*Woodward Nursing Home, Inc v Medical Arts, Inc*, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2006 (Docket No. 262794), unpub op at 1).]

This Court granted defendants' application for leave to appeal challenging the trial court's denial of their motion for summary disposition. *Id.* In our opinion, this Court ruled as follows regarding plaintiff's breach of contract claim:

Plaintiff sets forth a claim of breach of contract (count I). When an action is based on a written contract, it is necessary to plead and attach a copy of the contract to the complaint. MCR 2.113(F). The requirement that a written contract be attached to the pleadings is mandatory. Under MCR 2.113(F), the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8).

Although plaintiff purported to reproduce certain contractual language in the text of the complaint, plaintiff did not attach a copy of the actual written contract to any pleading submitted to the trial court. Nor did plaintiff provide any reasons for not attaching the written contract. Because plaintiff did not comply with the mandatory language of MCR 2.113(F), failing to attach evidence of a written contract and failing to provide any reasons why the contract was not produced, plaintiff's pleadings were legally insufficient to state a claim of breach of contract. [*Id.* at 3-4 (internal citations omitted).]

This Court also dismissed plaintiff's negligence claim (count II):

Plaintiff's remaining claims should have been dismissed for failure to state a claim. Count II of plaintiff's complaint asserts a claim of negligence. Upon close examination of the pleadings, it is apparent that plaintiff was attempting to set forth a claim for *negligent performance of the contract*. Michigan courts recognize that actionable negligence may arise from a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract. But a nonparty to the contract cannot assert a tort claim based on the negligent performance of the contractual obligation unless the nonparty was owed a duty separate and distinct from the defendant's contractual obligations. When a party to the contract brings a claim of negligent performance, the courts distinguish between misfeasance (negligent action) and nonfeasance (inaction) of the contractual duty; complete nonfeasance is actionable only in contract.

Here, plaintiff is a party to the contract. Plaintiff does not allege that defendants were merely negligent in filling the prescription order. Instead, plaintiff alleges defendants *wholly failed* to process the prescription order. Thus, the conduct plaintiff alleges constitutes nonfeasance; it cannot support a tort action. Plaintiff's allegations in count II fail to state an actionable claim of negligent performance of a contract. [*Id.* at 3 (emphasis in original, internal citations and quotations omitted).]

The Court also dismissed plaintiff's malpractice claim (count III) for failure to file an Affidavit of Merit or Notice of Intent. *Id.* at 3. The Court dismissed plaintiff's fraud claim (count IV) because "the complaint is legally insufficient to state a claim of fraud." *Id.* at 4. In its opinion, we summarized:

Plaintiff's claims of negligent performance and fraud are dismissed with prejudice. Plaintiff's breach of contract claims are dismissed without prejudice to a future claim that complies with MCR 2.113(F). Plaintiff's claim of medical malpractice is dismissed without prejudice. In light of our disposition of these issues, we need not reach defendant's alternative grounds for reversal. [*Id.* at 4-5 (footnote and internal citations omitted).]

On January 17, 2007, plaintiffs then filed the instant action against defendants. The complaint alleged breach of contract and implied contract, and breach of warranty and implied warranty (count I), misrepresentation (count II), pharmaceutical malpractice and pharmaceutical negligence (count III), malpractice on the part of an individual agent, negligent supervision, and vicarious liability (count IV), and negligent performance of a contract (count V). On April 16, 2007, plaintiffs filed an amended complaint that alleged the same claims asserted in the January 17, 2007, complaint; however, plaintiffs attached the Pharmacy Consultant Agreement, the Vendor Pharmacy Agreement, the Nursing Staff Agreement, and an Affidavit of Merit of Nursing Consultant.

On June 1, 2007, defendants moved for summary disposition, arguing that the misrepresentation claim should be dismissed in light of this Court's prior opinion. Defendants also contended that plaintiff's pharmaceutical malpractice and pharmaceutical negligence claims should be dismissed because plaintiff failed to file a statutorily compliant Notice of Intent or a statutorily compliant Affidavit of Merit. Finally, defendants argued that plaintiff, Dr. Meer J. Deen, lacked the legal capacity to sue and that his claim should be dismissed. The majority of defendants' brief in support of their motion was dedicated to arguing that plaintiffs' claims sound in medical malpractice and should be dismissed because plaintiff failed to file a statutorily compliant Notice of Intent or Affidavit of Merit.

In response, plaintiffs argued that this Court's prior opinion did not bar them from pursuing the breach of contract claims or malpractice claims in this new cause of action. Plaintiffs argued that defendants were negligent and breached the applicable standard of care by its misfeasance and nonfeasance.

On September 10, 2007, the trial court entered an order granting in part, and denying in part, defendants' motion for summary disposition. The order stated, in pertinent part:

IT IS HEREBY ORDERED that Meer J. Deen, M.D., is hereby dismissed as a Plaintiff, that the "Affidavit of Merit of Nursing Consultant" signed by Hanie Lee Pascual is hereby stricken, and that Plaintiff's claims for negligence and medical malpractice, misrepresentation, fraud, breach of warranty, breach of implied contract, and breach of implied warranty are hereby dismissed with prejudice.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss the Breach of Contract Claim, Count I, is denied without prejudice and that said claim remains Plaintiff's only surviving theory of liability.

On December 4, 2007, defendants filed a motion for summary disposition on the remaining breach of contract claim. Defendants argued that the breach of contract claim should be treated as a "disguised medical malpractice claim and dismissed due to the absence of an affidavit of merit." Furthermore, defendants also argued that plaintiff's failure to comply with its own policies and procedures and its failure make remedial efforts to fill the prescription caused plaintiff to lose its Medicaid Provider Certification.

On January 25, 2008, plaintiff filed a response to defendants' motion for summary disposition. Plaintiff argued its breach of contract claim does not sound in medical malpractice. Plaintiff also asserted that a genuine issue of material fact existed regarding defendants' breach of the Pharmacy Consultant Agreement.

The trial court denied defendants' motion for summary disposition because it determined that there was a question of fact for the contract claim.

On April 21, 2008, defendants filed an application for leave to appeal the trial court's order denying its motion for summary disposition. This Court granted defendants' application for leave to appeal. *Woodward Nursing Home, Inc v Medical Arts, Inc*, unpublished order of the Court of Appeals, entered August 29, 2008 (Docket No. 284968). On appeal, defendants argued

“that any breach of the pharmacy agreement is a medical malpractice allegation, not a breach of contract claim, and that the claim should be dismissed for failure to provide a suitable affidavit of merit as required for medical malpractice claims.” *Woodward Nursing Home, Inc v Medical Arts, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 25, 2009 (Docket No. 284968), unpub op at 2. This Court held:

In this case, we need not decide whether the cause of action plaintiff has pleaded under the rubric of contract is in fact a medical malpractice claim, because it is sufficient to note simply that it is not a contract claim, and to reverse for that reason.

A court may properly look behind the technical label that plaintiff attaches to a cause of action to the substance of the claim asserted.

In this case, plaintiff’s contract claim asserts damages in the form of lost certification as a Medicaid provider, which in turn allegedly caused (1) plaintiff to cease operating as a nursing home, (2) termination by the state of plaintiff’s provider agreement, and (3) regulatory sanctions. There is no allegation that plaintiff suffered expenses in having to obtain the expected product or service elsewhere, and no demand for a refund of consideration tendered for products not delivered. Plaintiff has thus claimed damages sounding in tort, not in contract. Plaintiff’s contract claim includes no prayer for contract damages, and the trial court erred by failing to dismiss it for this reason alone.

We reverse the trial court’s decision to let the contract claim go forward, and remand this case to the trial court for further proceedings consistent with this opinion. [*Id.* (internal citations and quotations omitted).]

On July 24, 2009, defendants filed a motion for entry of an order dismissing with prejudice plaintiff’s claims. Defendants argued that, pursuant to this Court’s June 25, 2009, opinion, the trial court should enter an order dismissing the breach of contract claim. In its motion, defendants noted that plaintiff had neither filed a motion for reconsideration in the Court of Appeals nor sought leave of the Michigan Supreme Court.

On July 30, 2009, plaintiff filed a document labeled “Response to Defendants’ Motion for Summary Disposition.” In its response, plaintiff simply argued that it was entitled to amend its complaint to cure any deficiency. Plaintiff attached a 13-page, proposed, second-amended complaint.

On July 31, 2009, the trial court held a hearing on defendants’ motion for entry of order of dismissal with prejudice. At the hearing, the trial court noted, “There were four counts. I dismissed three. They reversed me and said it [the breach of contract claim] should be dismissed. So there’s nothing really to argue about. The Court will grant Defendant’s [sic] motion.”

On the same day, plaintiff’s counsel filed a motion to amend its complaint. Plaintiff argued that the Court of Appeals reversed the trial court’s ruling denying defendants’ motion for summary disposition because plaintiff failed to plead contract damages, and that accordingly,

plaintiff should be allowed to amend its complaint to cure the deficiency noted by the Court of Appeals. Plaintiff asserted that the deficiency is a hyper-technicality and that the parties understood all along that plaintiff was seeking damages as a consequence of the loss of the Medicaid Provider Certification. Plaintiff attached a 13-page, proposed, amended complaint.³

The proposed amended complaint alleged three theories of liability, breach of contract (count I), breach of implied warranty (count II) and interference with business relations (count III). Plaintiff alleged that defendants breached its obligations under the Pharmacy Consultant Agreement and the Vendor Pharmacy Agreement.

On August 14, 2009, plaintiff filed a combined motion for relief from the July 31, 2009, order, a motion to amend its complaint, and a motion for reconsideration. Plaintiff asserted that the court “granted a motion for summary disposition in this matter on or about July 31, 2009, without opportunity for the Plaintiff to AMEND its COMPLAINT.” Plaintiff argued that contract damages “while purportedly not directly incorporated within the contract count were properly before the court and included with the COMPLAINT.” It asserted that the court should allow it to amend its complaint to prevent a palpable error and an injustice to plaintiff where a hyper-technical defect in the pleadings was otherwise overlooked by defendants throughout the litigation.

Plaintiff’s counsel also argued that he did not have adequate notice of the July 31, 2009, hearing. He asserted that he received notice the day before the hearing, in violation of MCR 2.119(C). Plaintiff’s counsel explained that he was out of town on July 31, 2009. Attorney Thomas Stanley went to court and “filed a partial response to the motion on behalf of plaintiff” on July 30, 2009. According to plaintiff’s counsel, the court clerk initially informed Stanley that there was no scheduled hearing for July 31, 2009. Later, the court clerk telephoned Stanley and notified him that there was a hearing on July 31, 2009. At the hearing, Attorney Douglas Maclean appeared as substitute counsel. He informed defendants’ counsel that there may be an issue of inadequate notice and requested an adjournment.

On September 9, 2009, defendants filed a response to plaintiff’s motion to amend its complaint and plaintiff’s motion for relief from the July 31, 2009, order. Defendants argued that despite plaintiff’s claim that the court’s dismissal was “without opportunity for the Plaintiff to amend its complaint,” plaintiff failed to appear for the hearing on July 31, 2009, and failed to file a timely motion to amend its complaint.

On October 21, 2009, plaintiff filed a supplement to its motion to amend its complaint. It requested that the trial court disregard the earlier proposed amended complaint for a 33-page amended complaint attached its motion to supplement. The 33-page amended complaint alleged four counts against defendants. Counts I and III alleged a breach of contract. Count II alleged willful or intentional breaches. Count IV alleged theories of liability based on unconscionable contract clauses, frustration of purpose, and piercing the corporate veil.

³ This was the same proposed complaint that was attached to its response filed the day before on July 30, 2009.

On October 26, 2009, defendants filed their response to plaintiff's October 21, 2009, motion to supplement. Defendants argued that plaintiff had no standing to amend the complaint because the lawsuit was dismissed on July 31, 2009. Defendants also asserted that plaintiff lacked standing because it could not challenge the Court of Appeals decision in the trial court.

On October 30, 2009, the trial court entered an order that denied plaintiff's motion, and plaintiff appeals as of right.

II. NEGLIGENCE CLAIMS

Plaintiff argues that the trial court erred in dismissing its negligence claims on defendants' motion for summary disposition. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). When reviewing the record de novo, this Court must determine whether the moving party was entitled to judgment as a matter of law. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005).

As previously noted, in a prior appeal, this Court dismissed plaintiff's negligent performance of a contract claim "with prejudice." *Woodward Nursing Home, Inc v Medical Arts, Inc*, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2006 (Docket No. 262794). After this Court rendered its opinion, plaintiff filed a new complaint, which contained a count alleging pharmaceutical malpractice and pharmaceutical negligence. On appeal, plaintiff argues that the claim is proper because "[i]n the context of 'negligent performance of a contract' if the action in tort requires a breach of duty separate and distinct from a breach of contract, then the action may be maintained." While this is a correct summary of the law, see *Ferrett v General Motors Corp*, 438 Mich 235, 245; 475 NW2d 243 (1991), the law of the case doctrine prohibits plaintiff from reasserting this claim. "The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). Thus, regardless of whether this particular negligent performance of a contract claim was defective or not, plaintiff was prohibited from raising it, and the trial court did not err when it dismissed the claim.

III. BREACH OF CONTRACT CLAIMS

Plaintiff also argues that the trial court erred in dismissing its breach of contract claims without allowing it the opportunity to amend its complaint. We disagree.

This Court reviews the trial court's decision to grant or deny leave to amend the complaint for an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). The abuse of discretion standard recognizes "'that there will be circumstances in which . . . there will be more than one reasonable and principled outcome.'" *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under this standard, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Under MCR 2.116(I)(5), if the trial court grants summary disposition pursuant to MCR 2.116(C)(8), (9) or (10), “the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.” MCR 2.118(A)(2) provides that leave to amend pleadings “shall be freely given when justice so requires.” A motion to amend pleadings should ordinarily be denied only for particularized reasons, including undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice or futility. *Wormsbacher v Phillip R Seaver Title Co, Inc*, 284 Mich App 1, 8; 772 NW2d 827 (2009).

The trial court did not abuse its discretion in denying plaintiff the opportunity to amend its complaint to cure the defect revealed by the Court of Appeals. This is the third time this case has been before this Court. The first suit was filed seven years ago on October 15, 2004. In that suit, plaintiff asserted the same breach of contract claim. The 2004 case was appealed to this Court after the trial court denied defendants’ motion for summary disposition. The Court of Appeals reversed the trial court. It held that plaintiff’s pleadings were legally insufficient to state a claim for breach of contract because plaintiff failed to attach a copy of the written contract to any pleading submitted to the trial court. *Woodward Nursing Home, Inc v Medical Arts, Inc*, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2006 (Docket No. 262794).

On January 17, 2007, plaintiff refiled a complaint, again alleging a breach of contract. This time, plaintiff attached three contracts to the complaint in compliance with the Court of Appeals previous instruction. Subsequently, the trial court denied defendants’ motion for summary disposition finding that there was an issue of material fact regarding the breach of contract claim, and defendants appealed that issue. The Court of Appeals reversed the trial court and held that plaintiff’s pleading was insufficient. Specifically, the Court held:

Plaintiff has thus claimed damages sounding in tort, not in contract. Plaintiff’s contract claim includes no prayer for contract damages, and the trial court erred by failing to dismiss it for this reason alone.

We reverse the trial court’s decision to let the contract claim go forward, and remand this case to the trial court for further proceedings consistent with this opinion. [*Woodward Nursing Home, Inc v Medical Arts, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 25, 2009 (Docket No. 284968), (unpub op at 2).]

Again, the Court of Appeals found a deficiency in plaintiff’s complaint.

On remand, defendants immediately filed a motion for a final order of dismissal. On July 31, 2009, the trial court held a hearing on defendants’ motion for a final order of dismissal. Plaintiff’s counsel requested an adjournment, and the trial court denied the request. The trial court subsequently entered an order of dismissal. On the same day, plaintiff filed a motion to amend its complaint.

Under MCR 2.116(I)(5), “the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118.” However, plaintiff failed to file a motion to amend its

complaint before the final order of dismissal was entered. There were 35 days between the date the Court of Appeals issued its opinion, noting the deficiency in plaintiff's pleadings, and the date the trial court entered a final order dismissing plaintiff's claim. Plaintiff idly sat on its hands and took no action for those 35 days. In fact, on July 24, 2009, defendants filed a motion for entry of final order dismissing plaintiff's breach of contract claim pursuant to the Court of Appeals opinion. The motion included a proof of service dated July 23, 2009. Plaintiff did not file a response to defendants' motion for entry of order until July 30, 2009, one day before the hearing. Under MCR 2.119(C)(4), any response to a motion required or permitted must be filed three days before the hearing. Plaintiff failed to comply with the court rule and untimely filed its response to the motion for entry of final order. Nonetheless, on July 23, 2009, plaintiff was on notice of defendants' pending motion for entry of a final order and plaintiff did nothing. Instead, plaintiff filed a motion to amend its complaint on the same day the trial court entered a final order dismissing plaintiff's claims. This motion was untimely filed. Accordingly, the trial court did not abuse its discretion in denying plaintiff's motion to amend its complaint.

Having concluded that the trial court did not abuse its discretion in denying plaintiff the opportunity to amend its complaint, we will briefly discuss whether the trial court erred in dismissing plaintiff's breach of contract claim. The Court of Appeals determined that plaintiff failed to state a claim upon which relief could be granted. It held that plaintiff's breach of contract claim "include[] no prayer for contract damages" and the damages sought sound in tort not contract. The Court of Appeals opinion ordered the trial court to "reverse the trial court's decision to let the contract claim go forward." The trial court dismissed plaintiff's breach of contract claim as directed by the Court of Appeals. As noted previously, once an issue has been decided by this Court, this Court's decision is binding on the appellate court and all lower courts under the law of the case doctrine. *Ashker*, 245 Mich App at 13. Moreover, "when an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order." *K & K Constr, Inc v Dep't of Env'tl Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005). "It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court." *Id.* at 544-545, quoting *Rodriguez v Gen Motors Corp (On Remand)*, 204 Mich App 509, 514; 516 NW2d 105 (1994). Therefore, the trial court was required to comply with this Court's clear remand instructions, directing it to "reverse [its] decision to let the contract claim go forward."

Affirmed. Defendant, the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio